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United States 1612

Circuit Court of Appeals

For the Ninth Circuit.

ELECTRIC STEEL FOUNDRY, a Corporation,
Appellant,

vs.

CLYDE G. HUNTLEY, as Collector of United
States Internal Revenue for the District of
Oregon, and W. S. SHANKS, as Deputy
Collector of United States Internal Revenue
for the District of Oregon,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Oregon.

FILED

MAR 21 1929

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

D. J. MALARKEY and A. M. DIBBLE, 1512 Yeon Building, Portland, Oregon, and E. B. SEABROOK, 1225 Yeon Building, Portland, Oregon,

For the Appellant.

GEORGE NEUNER, United States Attorney for the District of Oregon, and FORREST E. LITTLEFIELD, Assistant United States Attorney for the District of Oregon, Old Post Office Building, Portland, Oregon, and GEORGE G. WITTER, Special Counsel, Bureau Internal Revenue, 703 Republic Building, Seattle, Washington,

For the Appellees.

In the District Court of the United States for the
District of Oregon.

IN EQUITY—No. E.-8945.

ELECTRIC STEEL FOUNDRY, a Corporation,
Complainant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of Oregon, and W. S. SHANKS, as Deputy Collector of the United States Internal Revenue for the District of Oregon,

Respondents.

CITATION ON APPEAL.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

To Clyde G. Huntley, as Collector of United States Internal Revenue for the District of Oregon, and W. S. Shanks, as Deputy Collector of United States Internal Revenue for the District of Oregon, Respondents Above Named, and to Messrs. George Neuner and Geo. S. Witter and Forrest E. Littlefield, Your Attorneys and Solicitors Herein, GREETING:

WHEREAS, Electric Steel Foundry, a corporation, the complainant above named has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, on December 26, 1928, and has given the security required by law,—

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said United States Circuit Court of Appeals for [1*] the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

*Page-number appearing at the foot of page of original certified Transcript of Record.

GIVEN under my hand, at Portland, in said District, this 11th day of February, in the year of our Lord. one thousand nine hundred and twenty-nine.

JOHN G. McNARY,
Judge.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing citation on appeal is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD,
Assistant U. S. Attorney,
Of Solicitors and Counsel for the Above-named
Respondents and Appellees. [2]

[Endorsed]: Filed Feb. 11, 1929. [3]

In the District Court of the United States for the
District of Oregon.

November Term, 1927.

BE IT REMEMBERED, That on the 28th day of December, 1927, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint, in words and figures as follows, to wit. [4]

In the District Court of the United States for the
District of Oregon.

ELECTRIC STEEL FOUNDRY, a Corporation,
Complainant,

vs.

CLYDE G. HUNTLEY, as Collector of United
States Internal Revenue for the District of
OREGON, and W. S. SHANKS, as Deputy
Collector of United States Internal Revenue for the District of Oregon,
Respondents.

COMPLAINT.

The complainant complains of respondents and for cause of suit alleges the following facts:

I.

During the times herein mentioned respondent Clyde G. Huntley was and now is the duly appointed, qualified and acting Collector of United States Internal Revenue for the District of Oregon and residing in the city of Portland, State of Oregon. And during said times respondent W. S. Shanks was and now is a duly appointed, qualified and acting Deputy Collector of United States Internal Revenue for the District of Oregon and residing in the said city of Portland.

II.

On September 26, 1925, the respondents, acting in their said official capacities, obtained and pro-

cured from complainant by means of fraud and duress, as hereinafter more particularly stated, the signature of complainant's secretary and the affixing of complainant's seal by said secretary to a certain document in writing concerning the collection of United States income taxes, in words [5] and figures as follows:

“September 26, 1925,
(Date)

INCOME AND PROFITS TAX WAIVER.

In order to enable the Bureau of Internal Revenue to give thorough consideration to any claims for abatement or credit filed by or on behalf of Electric Steel Foundry of Ft. of Salmon St., Portland, Oregon, covering any income, excess-profits or war-profits tax assessed against the said taxpayer under the existing or prior Revenue Acts for the year(s)—1918—, and to prevent the immediate institution of a proceeding for the collection of such tax prior to the expiration of the six year period of limitation after assessment within which a distraint or a proceeding in Court may be begun for the collection of the tax, as provided in Section 278 (d) of the existing Revenue Act, the said taxpayer hereby waives any period of limitation as to the time within which distraint or a proceeding in Court may be begun for the collection of the tax, or any portion thereof, assessed for the said year(s), and hereby consents to the collection thereof by distraint or a proceeding in court begun at any time prior to the expiration of this waiver.

This waiver is in effect from the date it is signed and will remain in effect until December 31, 1926.

ELECTRIC STEEL FOUNDRY,

Taxpayer.

By GEO. F. SCHOTT, Sect. (Corporate Seal)

If this waiver is executed in behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporations, in addition to which, the seal, if any, of the corporation must be affixed.”

III.

Said document was executed and signed by Geo. F. Schott, secretary of complainant, and complainant's seal affixed thereto, under the following circumstances and not otherwise:

On May 9, 1919, complainant filed with the Collector of United States Internal Revenue for the District of Oregon a return of its income taxes for the year 1918, showing a tax due the United [6] States of \$345,095.39, which sum was assessed on July 24, 1919, as the tax due, of which complainant paid the sum of \$217,592.11, leaving a balance unpaid of the sum of \$127,503.28; and complainant thereupon filed a claim of abatement of said balance, and on December 8, 1924, abatement thereof in the sum of \$24,970.08 was allowed by the Internal Revenue Department of the United States.

No other or further assessment or determination of taxes due under said return was made until and on February 8, 1924, when the United States Com-

missioner of Internal Revenue levied and assessed an additional tax on said return of \$51,556.79.

On January 22, 1924, complainant and said commissioner, entered into a waiver agreement in words and figures as follows:

“IT:CR:C

FLH

January 22, 1924

Parent.

(date)

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Electric Steel Foundry, of Portland, Oregon, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Electric Steel Foundry for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled ‘An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes.’ Approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be

made for the year or years mentioned. Limited to March 15, 1925.

ELECTRIC STEEL FOUNDRY,

Taxpayer.

By GEO. F. SCHOTT, Sect.

If this waiver is executed in behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed." [7]

No additional or other assessments or determination of taxes due under said return for 1918 was made within the period consented to in said waiver agreement last above described, and on March 15, 1925, when said waiver agreement expired, said taxes and additional taxes, so assessed and determined within five years from the filing of said return, and the collection thereof, were barred by the statute of limitation prescribed by the Revenue Act of Congress of 1918, and the Revenue Act of Congress of 1921, and the Revenue Act of Congress of 1924.

On September 25, 1925, respondent Collector, acting through his deputy John W. Cochran, issued to respondent W. S. Shanks a distraint warrant, a substantial copy of which is attached hereto and marked Exhibit "A," commanding said Shanks to collect the said balance of taxes for 1918 amounting to \$127,503.28 and interest thereon amounting to \$44,607.07, aggregating \$172,110.35, and to distraint the property of complainant for the said purpose,

notwithstanding the assessment and collection of said taxes were barred by the said statutes of limitations. And on September 26, 1925, said Shanks served said distraint warrant upon complainant's secretary, Geo. F. Schott, in the city of Portland, Oregon, and at the same time handed to complainant's said secretary the said document set out in Paragraph II hereof, except that the same was not then signed or sealed.

Said Shanks, thereupon, demanded of said Schott that complainant immediately pay the amount of said distraint warrant, to wit: The sum of \$172,-110.35, or, as an alternative, that he sign and seal said waiver on behalf of complainant, and thereupon said Shanks threatened said Schott that unless he immediately complied with one or the other of said demands that he, said Shanks, [8] under said distraint warrant, would take possession of the plant, factory and property of the complainant and sell the same to recover the amount of said warrant.

Said Schott asked of said Shanks a reasonable time to consult complainant's legal advisers, but the same was refused; he then asked time until the next day when the president and executive head manager of complainant would be present—he being absent from the city of Portland, Oregon, at that time—and the matter could be submitted to him, but that request was likewise refused.

The complainant was then the owner and in possession of valuable property consisting of its foundry, factory, buildings, furnaces, equipment, tools

and implements as well as a large stock of raw materials and manufactured products, all being situated in said city of Portland, Multnomah County, State of Oregon, and being the plant and instrumentalities with which complainant carried on its business, and all of great value, but which under forced sale by said Collector under said distraint warrant would not realize or bring more than one-third of its actual value, all of which was then well known to said Schott.

Said Schott also then well knew and it is a fact that the carrying out of this threat of taking possession of said property by said Shanks and selling the same thereunder would ruin complainant and render it insolvent and the effect of said threat was to deprive said Schott of any ability to act according to his own will and judgment, and so frightened and scared said Schott that he permitted said Shanks to substitute his will for that of said Schott and compel said Schott to act contrary to his own wishes and will and according to that of said Shanks, and, thereupon, said Schott, without any authority whatever from the Board of Directors of the complainant or from the president or manager of complainant, but solely by reason of the said threat of said Shanks, signed said document on behalf of complainant and attached complainant's seal [9] thereto. That said document was not signed or executed by or on behalf of this complainant otherwise than as stated herein.

IV.

Complainant has not at any time authorized the

execution of said waiver agreement by said Schott and has not ratified or confirmed the same in any way.

V.

On said September 25, 1925, the Revenue Act of Congress of 1924, which was enacted on June 6, 1924, was in full force and effect and all previous Revenue Acts of Congress had been repealed. Said Revenue Act of 1924 by Section 277 (a), sub. (2) thereof, provided as follows:

“Except as provided in Section 278 and in subdivision (b) of Section 274 and in subdivision (b) of Section 279—

(2) The amount of income, excess profits, and war profits taxes imposed by the Act entitled ‘An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,’ approved August 5, 1909, the Act entitled ‘An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,’ approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.”

And said Revenue Act of 1924 by Section 278 subdivision (c) and (e) thereof provided as follows:

“(c) Where both the Commissioner and the taxpayer have consented in writing to the as-

assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.”

“(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.”

There is no provision of any kind in said Revenue Act of 1924 authorizing the exaction or giving of said document, described in paragraph II hereof, or giving the same any effect whatever. [10]

WHEREFORE, complainant prays for a decree of this Court that said document described in paragraph II of this complaint dated September 26, 1925, be cancelled and held for naught; and that plaintiff have such other and further relief as to this Court may seem equitable in the premises.

MALARKEY, SEABROOK & DIBBLE.

MALARKEY, SEABROOK & DIBBLE,
Attorneys and Solicitors for Complainant. [11]

EXHIBIT "A."

WARRANT FOR DISTRAINT.

Balance Forward	Date	Charge	Last Credit	Unpaid Balance	Account Number & Remarks
				127,503.28	40116—1919
					1918 Income Tax
					Abatement Claim filed
					12-13-19 still pending
					(This warrant is issued in accordance with A & C Mim. #3341 dated Sept. 1, 1925)
					Date of first notice:
					9-15-19
					Date of second notice:

Electric Steel Foundry,
 Ft. Salmon St.,
 Portland, Oregon.

To W. S. Shanks, Deputy Collector:

WHEREAS in pursuance of the provisions of the Acts of Congress relating to internal revenue the above named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same become due; and WHEREAS, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; AND WHEREAS, said person or persons still neglect or refuse to pay the same; You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to prop-

erty, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with 5 per centum additional upon the amount of the tax or taxes, and interest at the rate of 1 per centum per month from the time the tax or taxes became due, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. [12]

Tax	127,503.28
Penalty of 5 per centum
Interest for 72 months and — days (on \$41,229.44) @ $\frac{1}{2}\%$ per mo.	
Interest for 69 months (on \$86,273.84)	44,607.07
<hr/>	
Total tax, penalty and interest due on date of second notice	172,110.35
Amount of additional interest due from date of second notice	
<hr/>	

WITNESS my hand and official seal at Portland, Oregon, this 25th day of September, 1925.

JOHN W. COCHRAN,

Collector of Internal Revenue,

Deputy Collector in Charge.

Internal Revenue Collection District of Oregon.

Filed December 28, 1927. [13]

AND AFTERWARDS, to wit, on the 17th day of September, 1928, there was duly filed in said court a motion to dismiss the bill of complaint, in words and figures as follows, to wit: [14]

[Title of Court and Cause.]

MOTION TO DISMISS BILL OF COMPLAINT.

Come now the defendants by their attorney, Forrest E. Littlefield, Assistant United States Attorney for the District of Oregon, and move the Court for an order dismissing the bill of complaint herein on the ground and for the reason that the United States is an indispensable party defendant to this suit and that the United States cannot be made a party defendant herein for the reason that it has not consented to be made such party defendant.

FORREST E. LITTLEFIELD,

Assistant United States Attorney for the District
of Oregon.

United States of America,
District of Oregon,—ss.

Due and legal service of the within motion is hereby admitted and accepted within the State and District of Oregon, on the 18th day of September, 1928, by receiving a copy thereof duly certified to as a true and correct copy of the original by Forrest E. Littlefield, Assistant United States Attorney for the District of Oregon.

E. B. SEABROOK,
Of Attorneys for Complainant.

Filed September 17, 1928. [15]

AND AFTERWARDS, to wit, on Monday, the 29th day of October, 1928, the same being the 92d judicial day of the regular July Term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [16]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 29, 1928—
ORDER SUSTAINING MOTION TO DIS-
MISS BILL OF COMPLAINT.

This cause was heard by the Court upon the motion of the defendant to dismiss the bill of complaint in said cause, and was argued by Mr. E. B.

Seabrook, of counsel for plaintiff, and Mr. George G. Witter, Special Assistant to the Attorney General, and Mr. Forrest E. Littlefield, Assistant United States Attorney. Upon Consideration whereof, IT IS ORDERED that said motion be, and the same is hereby, sustained. [17]

AND AFTERWARDS, to wit, on the 22d day of November, 1928, there was duly filed in said court a petition for rehearing, in words and figures as follows, to wit: [18]

[Title of Court and Cause.]

PETITION FOR REHEARING UNDER
EQUITY RULE No. 69.

To the Honorable ROBERT S. BEAN, Judge of
the Above Court:

The petition of the complainant, Electric Steel Foundry, showeth unto your Honor that, being aggrieved by the opinion and decision rendered herein sustaining the motion to dismiss the bill of complaint on October 29, 1928, whereby petitioner's bill of complaint is or will be dismissed, in rendering said opinion and decision the Court committed error in law, and overlooked and failed to consider material matters as follows:

The Court overlooked and failed to consider that the only right or interest that the Government had in the subject matter of the suit, i. e., the waiver, was acquired solely by the admitted fraudulent

acts of defendants complained of in the complaint; and it being admitted on the record that such acts were fraudulent defendants were not and could not be representatives of the Government and what they did could not and did not confer any rights or interest on the Government. [19]

The Court overlooked and failed to consider that the Collector is personally liable to the Government for the tax and if he failed to collect same the Government could collect it from him. And that the Collector obtained the waiver by duress to serve his personal ends in saving him from liability for the tax, and that, therefore, he has a personal interest in the result of this suit.

WHEREFORE petitioner humbly prays that your Honor will grant a rehearing, humbly submitting to such orders as the Court may make if this application be without merit.

MALARKEY, SEABROOK & DIBBLE,
Attorneys for Complainant.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within paper in Multnomah County Oregon, this 22d day of November, 1928, is hereby admitted.

J. W. McCULLOCH,
Assistant U. S. Attorney.

[Endorsed]: Filed November 22, 1928. [20]

AND AFTERWARDS, to wit, on Monday, the 3d day of December, 1928, the same being the 20th judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [21]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 3, 1928—
ORDER DENYING PETITION FOR RE-
HEARING OF MOTION TO DISMISS
BILL OF COMPLAINT.

Now, at this day, IT IS ORDERED that plaintiff's petition for a rehearing of defendant's motion to dismiss the bill of complaint herein be, and the same is hereby, denied. [22]

AND AFTERWARDS, to wit, on Wednesday, the 26th day of December, 1928, the same being the 37th judicial day of the regular November term of said court—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [23]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 26, 1928
—ORDER DISMISSING BILL OF COM-
PLAINT.

This cause came regularly on to be heard on Monday, October 22, 1928, on motion of defendants for an order dismissing the bill of complaint herein on the ground and for the reason that the United States is an indispensable party defendant to this suit and cannot be made such party defendant.

Plaintiff appeared by its attorney, E. B. Seabrook, and defendants appeared by George G. Witter, Special Attorney for the Bureau of Internal Revenue, and Forrest E. Littlefield, Assistant United States Attorney for the District of Oregon, and, the said motion having been argued by counsel and taken under advisement, the Court on the 29th day of October, 1928, sustained said motion; plaintiff herein filed a petition for rehearing on November 22, 1928, which said petition for rehearing was denied by the Court on December 3, 1928;

Now at this time, the Court being fully advised in the premises,—

IT IS ORDERED AND ADJUDGED that the bill of complaint herein be, and the same is hereby, dismissed, and that defendant recover of and from plaintiff their costs and disbursements incurred herein, taxed at \$10.00.

Dated at Portland, Oregon, this 26th day of December, 1928.

R. S. BEAN,
District Judge.

Filed December 26, 1928. [24]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [25]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Judges of the Above-entitled Court:

The above-named Electric Steel Foundry, a corporation, complainant above named, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 26th day of December, 1928, wherein and whereby it was ordered and adjudged that the bill of complaint of said complainant be dismissed and that respondents above named recover of and from said complainant their costs and disbursements incurred herein, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and said complainant prays that its appeal be allowed and that citation be issued, as provided by law, and that a transcript of the rec-

ord, proceedings and documents upon which said decree was based, duly authenticated, be sent to said United [26] States Circuit Court of Appeals for the Ninth Circuit, sitting at the city of San Francisco in the State of California, under the rules of such court in such cases made and provided.

And your petitioner, said complainant, further prays that a proper order relating to the required security to be required of it be made.

Dated at Portland, Oregon, this 11th day of February, 1929.

MALARKEY & DIBBLE.

MALARKEY & DIBBLE,

Solicitors and Counsel for Said Complainant and
Petitioner.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing petition for appeal is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD.

FORREST E. LITTLEFIELD,

Assistant U. S. Attorney,

Of Solicitors and Counsel for Respondents Above
Named.

Filed February 11, 1929. [27]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [28]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Electric Steel Foundry, a corporation, the complainant in the above-entitled court and cause, and, contemporaneously with the making and filing of its petition for appeal herein, files therewith the following assignments of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 26th day of December, 1928.

I.

That the United States District Court for the District of Oregon erred in holding and decreeing that the United States is a necessary and indispensable party to this suit and, since it cannot be sued, that this suit should be dismissed.

II.

That the United States District Court for the District of Oregon erred in holding and decreeing that this suit involves the right or title to Government property of the United States, [29] making the United States a necessary and indispensable party.

III.

That the United States District Court for the

District of Oregon erred in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit constitutes or is property and in holding and decreeing that it constitutes property belonging to the United States or in which it has or should have or claim any interest or benefit.

IV.

That the United States District Court for the District of Oregon erred in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit was made for the use and benefit of the United States Government and that the latter could equitably or otherwise claim any interest in or benefit from said waiver or claim to be deprived of any of its rights or interests by the maintenance and prosecution of this suit without its being made a party thereto.

V.

That the United States District Court for the District of Oregon in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit has a face value and that such face value must be assumed.

VI.

That the United States District Court for the District of Oregon erred in holding and decreeing, under the facts admitted [30] by the motion to

dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit has a face value belonging to the United States Government and that respondents have no interest therein.

VII.

That the United States District Court for the District of Oregon erred in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that respondents have no personal interest in the result of this suit and that a decree against them would not be binding on the United States Government.

VIII.

That the United States District Court for the District of Oregon erred in sustaining respondents' motion to dismiss complainant's bill of complaint and in rendering and entering on the 26th day of December, 1928, a final order and judgment and decree in this suit, wherein and whereby it was ordered and adjudged that the bill of complaint herein be dismissed and that respondents recover of and from complainant their costs and disbursements incurred herein.

IX.

That the United States District Court for the District of Oregon erred in not denying respondents' motion to dismiss complainant's bill of complaint and in not holding and decreeing that from the facts admitted by said motion and apparent on the face of the record the United States Government had no right or title or interest in or to said

waiver or the subject of this suit and was not a necessary or indispensable party thereto. [31]

WHEREFORE the above-named complainant and appellant prays that said decree of the District Court of the United States for the District of Oregon rendered and entered on said December 26, 1928, be reversed and for the entry of a decree herein in favor of complainant and for such other and further relief as to the Court may seem equitable and proper.

MALARKEY & DIBBLE.

MALARKEY & DIBBLE,

Solicitors and Counsel for Complainant and Appellant.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing assignment of errors is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD.

FORREST E. LITTLEFIELD,

Assistant U. S. Attorney,
Of Solicitors and Counsel for Respondents and Appellees Above Named.

Filed February 11, 1929. [32]

AND AFTERWARDS, to wit, on Monday, the 11th day of February, 1929, the same being the 71st judicial day of the regular November term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [33]

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 11, 1929—
ORDER ALLOWING APPEAL.

On motion of A. M. Dibble, one of the solicitors and of counsel for the complainant above named, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein on December 26, 1928, be and the same is hereby allowed, and that a transcript of the record and of all of the proceedings and documents upon which said decree was based, duly certified and authenticated, as provided by law, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be and the same is hereby fixed at the sum of \$500.00.

Dated this 11th day of February, 1929.

JOHN H. McNARY.

JOHN H. McNARY.

District Judge.

Filed February 11, 1929. [34]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [35]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Electric Steel Foundry, a corporation duly organized and existing under the laws of the State of Oregon, as principal, and C. F. Swigert and W. G. Swigert, of the city of Portland, county of Multnomah and State of Oregon, as sureties, are held and firmly bound unto the above-named Clyde G. Huntley and W. S. Shanks, the respondents in the above-entitled court and cause in the sum of \$500.00 lawful money of the United States, to be paid to them and their respective executors, administrators, heirs and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators, successors and assigns by these presents.

Sealed with our seals and dated this 11th day of February, 1929.

WHEREAS the above-named Electric Steel Foundry, a corporation, the complainant in the above-entitled court and cause, [36] has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the de-

ce of the District Court of the United States for the District of Oregon, rendered and entered in the above-entitled cause on December 26, 1928;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Electric Steel Foundry, a corporation, shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

ELECTRIC STEEL FOUNDRY, a Corporation,

(Corporate Seal)

Principal.

By C. F. SWIGERT,

President.

C. F. SWIGERT, (Seal)

W. G. SWIGERT, (Seal)

Sureties. [37]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

On the 11th day of February, 1929, personally appeared before me C. F. Swigert and W. G. Swigert, respectively known to me to be the persons described in and who duly executed, as sureties, the foregoing bond on appeal, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth. And the said C. F. Swigert and W. G. Swigert, being respectively by me duly sworn, says, each for himself and not for the other, that he is a resident and freeholder of the

said county of Multnomah and that he is worth the sum of \$1,000.00 over and above his just debts and legal liability and property exempt from execution.

C. F. SWIGERT.

W. G. SWIGERT.

Subscribed and sworn to before me this 11th day February, 1929.

[Seal]

A. M. DIBBLE,

Notary Public for Oregon.

My commission expires July 1, 1932.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing bond on appeal is hereby admitted at Portland, Oregon [38] this 11th day of February, 1929, and said bond is hereby acknowledged to be satisfactory to respondents.

FORREST E. LITTLEFIELD,

FORREST E. LITTLEFIELD,

Assistant U. S. Attorney,

Of Solicitors and Counsel for Respondents Above
Named.

The within and foregoing bond on appeal is approved both as to sufficiency and form this 11th day of February, 1929.

JOHN H. McNARY.

JOHN H. McNARY,

District Judge.

Filed February 11, 1929. [39]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [40]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said Appellate Court and especially including therein the following documents:

- (1) Complaint.
- (2) Motion to dismiss bill of complaint.
- (3) Decision of the Court rendered October 29, 1928.
- (4) Petition for rehearing of motion to dismiss bill of complaint.
- (5) Order dismissing bill of complaint rendered and entered December 26, 1928. [41]
- ~~(6) Cost bill.~~
- (9) Petition for appeal.
- (10) Assignment of errors.
- (11) Bond on appeal.
- (12) Order allowing appeal.

(13) Citation on appeal, and

(14) This praecipe.

Dated at Portland, Oregon, this 11th day of February, 1929.

MALARKEY & DIBBLE.

MALARKEY & DIBBLE,

Solicitors and Counsel for Said Complainant and
Plaintiff in Error.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing praecipe is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD.

FORREST E. LITTLEFIELD,

Assistant U. S. Attorney,

Of Solicitors and Counsel for Respondents and Defendants in Error.

Filed February 11, 1929. [42]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered

from 4 to 42, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Electric Steel Foundry, a corporation, is plaintiff and appellant, and Clyde G. Huntley, as Collector of United States Internal Revenue for the District of Oregon, and W. S. Shanks, as Deputy Collector of United States Internal Revenue for the District of Oregon, are defendants and appellees; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$6.60, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 27th day of February, 1929.

[Seal]

G. H. MARSH,
Clerk. [43]

[Endorsed]: No. 5744. United States Circuit Court of Appeals for the Ninth Circuit. Electric Steel Foundry, a Corporation, Appellant, vs. Clyde G. Huntley, as Collector of United States Internal Revenue for the District of Oregon, and W. S. Shanks, as Deputy Collector of United States In-

ternal Revenue for the District of Oregon, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 1, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.